

Oct 18, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JULIE V.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:19-cv-03032-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 8. The Court, having reviewed the administrative record and the parties' briefing,
2 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
3 motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

6 **STANDARD OF REVIEW**

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be
16 "of such severity that he is not only unable to do his previous work[,] but cannot,
17 considering his age, education, and work experience, engage in any other kind of
18 substantial gainful work which exists in the national economy." 42 U.S.C. §
19 423(d)(2)(A).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
3 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
4 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
5 "substantial gainful activity," the Commissioner must find that the claimant is not
6 disabled. 20 C.F.R. § 404.1520(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
10 from "any impairment or combination of impairments which significantly limits
11 [his or her] physical or mental ability to do basic work activities," the analysis
12 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment
13 does not satisfy this severity threshold, however, the Commissioner must find that
14 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

15 At step three, the Commissioner compares the claimant's impairment to
16 severe impairments recognized by the Commissioner to be so severe as to preclude
17 a person from engaging in substantial gainful activity. 20 C.F.R. §
18 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 404.1520(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in
9 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
10 capable of performing past relevant work, the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
12 performing such work, the analysis proceeds to step five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
16 must also consider vocational factors such as the claimant's age, education, and
17 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of
18 adjusting to other work, the Commissioner must find that the claimant is not
19 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
20

1 other work, the analysis concludes with a finding that the claimant is disabled and
2 is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
6 capable of performing other work; and 2) such work “exists in significant numbers
7 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
8 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 On July 13, 2015, Plaintiff applied for Title II disability insurance benefits
11 alleging a disability onset date of March 25, 2014. Tr. 218-26. The application
12 was denied initially, Tr. 152-58, and on reconsideration, Tr. 160-66. Plaintiff
13 appeared before an administrative law judge (ALJ) on October 31, 2017. Tr. 41-
14 62. On March 28, 2018, the ALJ denied Plaintiff’s claim. Tr. 12-38.

15 At step one of the sequential evaluation process, the ALJ found Plaintiff had
16 not engaged in substantial gainful activity since March 25, 2014. Tr. 19. At step
17 two, the ALJ found that Plaintiff had the following severe impairments: lumbar
18 and cervical degenerative disc disease, status post lumbar and cervical surgical
19 intervention, depressive disorder, and anxiety disorder. Tr. 19.

1 At step three, the ALJ found Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled the severity of a listed
3 impairment. Tr. 19. The ALJ then concluded that Plaintiff had the RFC to
4 perform sedentary work with the following limitations:

5 [Plaintiff] can frequently use her upper extremities to handle, finger
6 and feel. She can frequently use her upper extremities to reach at or
7 below shoulder level. However, she cannot reach overhead. She can
8 occasionally stoop and crouch. She can never squat, crawl, kneel, or
9 climb stairs, ramps, ropes, ladders, scaffolds. She will be off task at
work 8% of the time, but still meet the minimum production
requirements of the job. She will be absent from work one time per
month. She is capable of engaging in unskilled, repetitive, routine
tasks in two-hour increments.

10 Tr. 21-22.

11 At step four, the ALJ found Plaintiff was unable to perform any past relevant
12 work. Tr. 30. At step five, the ALJ found that, considering Plaintiff's age,
13 education, work experience, RFC, and testimony from the vocational expert, there
14 were jobs that existed in significant numbers in the national economy that Plaintiff
15 could perform, such as charge-account clerk, call out-operator, and document
16 preparer. Tr. 31-32. Therefore, the ALJ concluded Plaintiff was not under a
17 disability, as defined in the Social Security Act, from the alleged onset date of
18 March 25, 2014, though the date of the decision. Tr. 32.

1 On December 21, 2018, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her disability insurance benefits under Title II of the Social Security Act. Plaintiff
7 raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
- 9 2. Whether the ALJ properly evaluated lay witness evidence; and
- 10 3. Whether the ALJ conducted a proper step-five analysis.

11 ECF No. 14 at 9.

12 DISCUSSION

13 A. Plaintiff's Symptom Claims

14 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in
15 discrediting her symptom claims. ECF No. 14 at 11-16. An ALJ engages in a two-
16 step analysis to determine whether to discount a claimant's testimony regarding
17 subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must
18 determine whether there is objective medical evidence of an underlying
19 impairment which could reasonably be expected to produce the pain or other
20 symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The

1 claimant is not required to show that [the claimant's] impairment could reasonably
2 be expected to cause the severity of the symptom [the claimant] has alleged; [the
3 claimant] need only show that it could reasonably have caused some degree of the
4 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

5 Second, “[i]f the claimant meets the first test and there is no evidence of
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
9 omitted). General findings are insufficient; rather, the ALJ must identify what
10 symptom claims are being discounted and what evidence undermines these claims.
11 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th 1996); *Thomas v. Barnhart*,
12 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it
13 discounted claimant’s symptom claims)). “The clear and convincing [evidence]
14 standard is the most demanding required in Social Security cases.” *Garrison v.*
15 *Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec.*
16 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

17 Factors to be considered in evaluating the intensity, persistence, and limiting
18 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
19 duration, frequency, and intensity of pain or other symptoms; 3) factors that
20 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and

1 side effects of any medication an individual takes or has taken to alleviate pain or
2 other symptoms; 5) treatment, other than medication, an individual receives or has
3 received for relief of pain or other symptoms; 6) any measures other than treatment
4 an individual uses or has used to relieve pain or other symptoms; and 7) any other
5 factors concerning an individual's functional limitations and restrictions due to
6 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
7 404.1529(c). The ALJ is instructed to "consider all of the evidence in an
8 individual's record," "to determine how symptoms limit ability to perform work-
9 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

10 The ALJ found that Plaintiff's medically determinable impairments could
11 reasonably be expected to cause some of her alleged symptoms, but that Plaintiff's
12 statements concerning the intensity, persistence, and limiting effects of her
13 symptoms were not entirely consistent with the evidence. Tr. 23.

14 *1. Symptoms Improved with Surgical Intervention*

15 The ALJ found that Plaintiff's symptom testimony was inconsistent with the
16 level of improvement she showed following her cervical and lumbar spine
17 surgeries, and effective pain control with the use of her medications. Tr. 24-26.
18 The effectiveness of treatment is a relevant factor in determining the severity of a
19 claimant's symptoms. 20 C.F.R. § 404.1529(c)(3); *see Warre v. Comm'r of Soc.*
20 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled

1 with medication are not disabling for purposes of determining eligibility for
2 benefits) (internal citations omitted); *see also Tommasetti v. Astrue*, 533 F.3d 1035,
3 1040 (9th Cir. 2008) (a favorable response to treatment can undermine a claimant's
4 complaints of debilitating pain or other severe limitations).

5 Here, the ALJ observed that while Plaintiff's cervical arthroplasty with disc
6 replacement at the C5-C6 on April 7, 2015 did not resolve her cervical spine
7 impairment, her treatment records and examination findings showed that her
8 symptoms were improved. Tr. 23-24; *see, e.g.*, Tr. 424, 504, 511 (April 2015: after
9 her cervical arthroplasty with disc replacement at the C5-C6, Plaintiff reported that
10 she had left shoulder pain, but she no longer had numbness and tingling down her
11 arms); Tr. 506 (July 2015: Plaintiff reported that her neck pain was resolving and
12 continuing to get better, and that the pain in her arms was gone); Tr. 707, 719, 746,
13 748 (For nearly two years following her surgery, Plaintiff complained infrequently
14 of neck pain and pain to her right hand digits); Tr. 626, 732, 755, 758, 760
15 (January and August 2017: Plaintiff's more recent radiographic evidence revealed
16 post-surgical changes of the C5-C6 with resultant artifact and mild central canal
17 stenosis at the C5-C6 and small disc bulges of the C4-C7 discs, but otherwise,
18 Plaintiff had unremarkable paraspinal tissue and atlantoaxial joints, with no
19 obvious extradural defects or spinal cord compression); Tr. 746 (July 2017: While
20 her medical provider noted that the metallic artifact seen on Plaintiff's MRI made

1 it difficult to determine whether Plaintiff's implanted disc was impinging on her
2 spinal cord or was just a blooming artifact, the imaging did not explain her right
3 hand pain, and her medical provider noted that the nerve roots that would be
4 involved in her alleged right hand pain were not the nerve roots that would be
5 affected by her prior cervical procedure; there was no evidence of compression of
6 either the C7 or C8 nerve roots); Tr. 751 (August 2017: Plaintiff's
7 electrodiagnostic evidence revealed no findings of median or ulnar neuropathy,
8 cervical radiculopathy, or brachial plexopathy affecting either upper extremity); Tr.
9 755-56 (August 2017: Plaintiff's medical provider noted there was not a clear
10 explanation for the source of Plaintiff's problems, "at least not stemming from her
11 neck," and that her symptoms were not significant enough for Plaintiff to be
12 interested in considering further surgical intervention at that time).

13 The ALJ also observed that while Plaintiff's three lumbar spine surgical
14 procedures did not resolve her spinal impairment, the medical record revealed that
15 she received some symptom improvement. Tr. 24-25; *see, e.g.*, Tr. 466, 472, 508
16 (June 19, 2014: Plaintiff underwent a lumbar decompression with a
17 laminectomy/foraminotomy of the bilateral S1 nerve); Tr. 495, 502, 538 (July 2014
18 and August 2014: Plaintiff reported that the procedure improved her lumbar and
19 radicular pain); Tr. 496, 498 501-02 (During late 2014, Plaintiff reported falling at
20 her home more than three times, and she also reported having back pain after

1 lifting buckets of dirt while helping her husband in the yard; Plaintiff reported that
2 she felt a popping sensation when she walked); Tr. 445-46 (January 2015:
3 radiographic evidence revealed degenerative changes of the lumbar spine, most
4 prominent at the L5-S1, with evidence of an L5 laminectomy with residual central
5 protrusion of the L5-S1 disc, but there was no evidence of significant instability
6 upon flexion and extension); Tr. 506 (July 2015: amid complaints of lower back
7 pain and some reduced lower extremity sensation, it was recommended that
8 Plaintiff receive epidural facet injections with a possibility for a lumbar fusion in
9 the future); Tr. 568, 578 (September 2015: Plaintiff sought emergent treatment due
10 to increased back pain after a drive to/from Spokane, Washington; an imaging
11 study at that time revealed stable and unchanged degenerative changes, but there
12 was an increased T2 signal involving the right S1 descending nerve root); Tr. 622
13 (October 19, 2015: Plaintiff underwent a lumbar spine fusion at the L5-S1); Tr.
14 619 (November 3, 2015: following her fusion, Plaintiff reported having some
15 numbness/burning in the right leg on the S1 distribution, but she reported having
16 overall pain improvement); Tr. 608 (October 2015: imaging studies did not reveal
17 hardware complication); Tr. 620 (December 2015: Plaintiff reported that she fell
18 off her back porch causing left sided back pain); Tr. 620, 624 (December 2015:
19 aside from her postsurgical changes of an anterior fusion at the L5-S1, her
20 radiographic evidence revealed no acute abnormalities or instability; instead, she

1 had intact hardware, normal alignment, well-preserved disc space, unremarkable
2 sacroiliac joints, no significant degenerative facet changes and no abnormal
3 movement between flexion and extension); Tr. 698 (April 2016: Plaintiff reported
4 having constant back pain that radiated to her right foot; she advised that her
5 second lumbar surgery did not relieve her pain); Tr. 627, 677, 700, 733 (April 2016
6 and June 2016: her imaging study revealed mild lumbar spine degenerative disc
7 disease and facet hypertrophy, most pronounced at the L5-S1 and evidence of her
8 anterior fusion of the L5 to S1, however, she had no evidence of listhesis (or nerve
9 root contact), implant loosening/failure, instability, fracture, tumor or infection,
10 and her bone marrow signal height and alignment were normal); Tr. 659
11 (November 2016: Plaintiff reported that she fell down the stairs at her home twice,
12 and she felt a pop in her lower back with numbness and tingling down her left leg);
13 Tr. 649 (January 2017: Plaintiff sought emergent treatment after falling again at
14 her home and as a result of this fall, and she complained of lower back pain and
15 right sided numbness/tingling); Tr. 631, 633, 711 (January 25, 2017: Plaintiff
16 underwent a right L4 laminectomy, L4-L5 facetectomy, and transforaminal lumbar
17 fusion); Tr. 713 (February 6, 2017: Immediately following her lumbar fusion,
18 Plaintiff reported having 60% improvement of her back pain since prior to her
19 surgery, and she advised that her pain was only occasional and responsive to her
20 pain medications); Tr. 717 (May 2017: Three months after her lumbar fusion,

1 Plaintiff's objective evidence showed no evidence of implant loosening/failure or
2 instability in flexion extension, and instead, she had evidence of healing of the
3 fusion).

4 The ALJ also noted that the record revealed the balance of Plaintiff's
5 modalities of treatment improved some of her symptoms. Tr. 25; *see, e.g.*, Tr. 500,
6 679, 688, 703, 722, 725, 748 (Plaintiff reported having between 30% to 60%
7 improvement in pain after her cervical/lumbar epidural injections); Tr. 503, 532,
8 541, 620, 628, 664, 671, 683, 688, 692, 695, 737 (Plaintiff was treated with a back
9 brace, muscle relaxants, oral steroids, trigger point/epidural steroid injections, and
10 anti-inflammatory, nerve, and narcotic pain medications). Further, the ALJ found
11 that the medical evidence showed Plaintiff had pain control with the use of her
12 medications. Tr. 26; *see, e.g.*, Tr. 496 (Plaintiff reported having periods in which
13 she could reduce her pain medication below her prescribed levels); Tr. 402, 495,
14 504 (Although Plaintiff infrequently advised of medication side effects such as
15 sleepiness, itching, or grogginess, her medical providers made medication/dosage
16 modifications that were effective at relieving some of Plaintiff's symptoms). The
17 ALJ reasonably concluded that the improvement Plaintiff reported in her
18 symptoms after her cervical and lumbar spine surgeries, along with pain
19 medication and the use of different modalities of treatment, supported a finding
20 that Plaintiff was capable of sedentary work with additional functional limitations,

1 which was inconsistent with Plaintiff's subjective symptom claims. Tr. 27.
2 Plaintiff argues that although she had some improvement for a limited time after
3 surgical intervention, the record shows that she experienced continuing severe
4 symptoms and her medical provider reported that Plaintiff "has not responded well
5 to prior surgery." ECF No. 14 at 13 (citing Tr. 523). It is the ALJ's responsibility
6 to resolve conflicts in the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035,
7 1039 (9th Cir. 1995). Where the ALJ's interpretation of the record is reasonable as
8 it is here, it should not be second-guessed. *Rollins v. Massanari*, 261 F.3d 853,
9 857 (9th Cir. 2001). The Court must consider the ALJ's decision in the context of
10 "the entire record as a whole," and if the "evidence is susceptible to more than one
11 rational interpretation, the ALJ's decision should be upheld." *Ryan v. Comm'r of*
12 *Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation marks omitted).
13 Here, the ALJ reasonably concluded, based on this record, that Plaintiff's
14 impairments when treated were not as limiting as Plaintiff claimed. Tr. 23-26.
15 The ALJ's finding is supported by substantial evidence.

16 *2. Failure to Follow Treatment Recommendations*

17 The ALJ found that Plaintiff's symptom complaints were inconsistent with
18 her failure to follow treatment recommendations. Tr. 26. "A claimant's subjective
19 symptom testimony may be undermined by an unexplained, or inadequately
20 explained, failure to . . . follow a prescribed course of treatment." *Trevizo v.*

1 *Berryhill*, 871 F.3d 664, 679 (9th Cir. 2017) (citations omitted). Failure to assert a
2 reason for not following treatment “can cast doubt on the sincerity of the
3 claimant’s pain testimony.” *Id.*

4 Here, the ALJ noted that Plaintiff alleged disabling limitations due to back
5 and neck impairments. Tr. 22-23. The ALJ observed that Plaintiff was advised to
6 participate in physical therapy on at least six occasions, Tr. 26; *see, e.g.*, Tr. 495
7 (“At this point, the recommendation would be to do physical therapy”); Tr. 503 (“I
8 would recommend a brace and some physical therapy exercise as she is doing”);
9 Tr. 505 (“We will get her started in some physical therapy at Peak Performance for
10 her cervical spine”); Tr. 704 (“I recommended physical therapy and a repeat
11 injection”); Tr. 717 (“I have recommended brace wearing and physical therapy”);
12 Tr. 738 (“I would recommend that we get her into some physical therapy dedicated
13 to her spine”). However, the ALJ noted that while Plaintiff received some physical
14 therapy, Tr. 501-02, 705, there were instances in which her medical providers
15 noted that she did not always pursue such treatment as recommended. Tr. 26
16 (citing Tr. 671, 728). Plaintiff argues that her depression interfered with her ability
17 to complete physical therapy each time it was recommended. ECF No. 14 at 17.
18 In support of this contention, Plaintiff asserts the evidence showed that she had
19 some “worse days” where she had trouble getting up and doing anything. ECF No.
20 14 at 17 (citing Tr. 596). However, the ALJ noted that Plaintiff frequently denied

1 having depression, little interest or pleasure in doing things, or feelings of
2 hopelessness. Tr. 27 (citing Tr. 679, 682, 685). When there is no evidence
3 suggesting that the failure to seek or participate in treatment is attributable to a
4 mental impairment rather than a personal preference, it is reasonable for the ALJ to
5 conclude that the level or frequency of treatment is inconsistent with the alleged
6 severity of complaints. *Molina*, 674 F.3d at 1113-14. On this record, the ALJ
7 reasonably concluded that Plaintiff's alleged disabling limitations were
8 inconsistent with her failure to follow treatment recommendations.

9 *3. Lack of Objective Medical Evidence*

10 The ALJ found that Plaintiff's physical and mental symptom complaints
11 were not supported by the medical evidence. Tr. 26, 28. Medical evidence is a
12 relevant factor in determining the severity of a claimant's pain and its disabling
13 effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2). Minimal objective
14 evidence is a factor which may be relied upon to discount a claimant's testimony,
15 although it may not be the only factor. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th
16 Cir. 2005).

17 a. Physical Impairments

18 The ALJ determined that Plaintiff's allegations of disabling back and neck
19 impairments were out of proportion to physical examinations which regularly
20 revealed benign findings. Tr. 26; *see, e.g.*, Tr. 469, 535, 546, 569, 630-31, 645,

649, 699, 707-08, 710-11, 729 (Plaintiff's medical providers frequently observed that she had active and pain free range of motion of her bilateral shoulders, elbows, wrists, hips, knees, ankles, cervical spine and lumbar spine); Tr. 404, 416, 469, 502, 504, 506, 519, 532, 543, 546, 552, 620-21, 649-50, 658, 661, 729, 746, 749 (Plaintiff commonly exhibited normal extremity sensation, motor tone and strength, as well as normal swallow capability and full deep tendon reflexes at the ankles and 1+ at the knees); Tr. 620-21, 645-46, 650 (Plaintiff had healed spinal incisions and normal, or no change in, neurovascular testing); Tr. 469, 667, 749 (Plaintiff's medical providers observed that she had negative Romberg, Babinski, and Hoffman signs); Tr. 619, 673 (Plaintiff demonstrated negative straight leg raise testing and improved sensory changes of the S1 dermatome); Tr. 496, 500-01, 552, 569, 620-21, 631, 650, 658, 699, 708, 711, 717, 729, 737-38 (Plaintiff's medical providers observed that she ambulated normally and had a full gait and station). The ALJ observed that the medical evidence also revealed instances where Plaintiff had mild positive straight leg raise testing, reduced muscle strength in the left upper extremity, diminished sensation in upper extremities, and sciatic distribution of pain/numbness down her bilateral S1 nerve. Tr. 26 (citing Tr. 469, 502, 506, 552, 661). The ALJ noted that, on occasion, Plaintiff exhibited a "very antalgic" gait, absent reflexes at the knees, right patellar, and left biceps/brachioradialis, and tenderness of the cervical spine, axial skeleton, left

1 greater trochanter, bilateral sacral joints and lumbar muscles. Tr. 26 (citing Tr.
2 404, 469, 496, 498, 500, 506, 525, 532, 535, 543, 546, 552, 621, 649, 671). The
3 ALJ also noted that Plaintiff intermittently demonstrated reduced range of motion
4 of her lumbar spine, her medical providers infrequently observed that she had a
5 careful and somewhat slowed gait and motor coordination, and in instances after
6 her surgical procedures, she ambulated with an assistive device. Tr. 26 (citing Tr.
7 404, 543, 569, 595, 619). However, the ALJ concluded that Plaintiff's abnormal
8 clinical presentations were offset by generally benign presentations noted
9 elsewhere in the record. Tr. 26.

10 b. Mental Impairments

11 The ALJ found that, despite Plaintiff's description of limiting depression and
12 anxiety, providers frequently observed normal mental status examinations. Tr. 28,
13 239; *see, e.g.*, Tr. 469, 501, 618, 631, 639, 645-46, 680, 686, 689, 699, 703, 720,
14 729, 737-38 (Plaintiff was observed as alert, oriented, calm, pleasant, well-
15 groomed, and cooperative); Tr. 469, 699, 703, 720, 729 (Plaintiff frequently
16 exhibited an appropriate mood/affect, full attention span, fluent speech, appropriate
17 knowledge, and intact cognition); Tr. 469, 501, 540, 573, 618, 631, 639, 699, 703,
18 720, 729, 737-38 (Plaintiff demonstrated normal memory, insight, and judgment,
19 and she denied having suicidal ideations). The ALJ highlighted an isolated
20 instance where Plaintiff was observed as depressed with an abnormal affect. Tr. 28

1 (citing Tr. 540). Plaintiff argues that, “while there were benign findings at times,
2 there were also many abnormal findings that support [Plaintiff’s] allegations.”
3 ECF No. 14 at 13. It is the ALJ’s responsibility to resolve conflicts in the medical
4 evidence. *Andrews*, 53 F.3d at 1039. Where the ALJ’s interpretation of the record
5 is reasonable as it is here, it should not be second-guessed. *Rollins*, 261 F.3d at
6 857. The Court must consider the ALJ’s decision in the context of “the entire
7 record as a whole,” and if the “evidence is susceptible to more than one rational
8 interpretation, the ALJ’s decision should be upheld.” *Ryan*, 528 F.3d at 1198
9 (internal quotation marks omitted). Here, the ALJ reasonably concluded, based on
10 this record, that the objective medical evidence did not support the level of
11 physical or mental impairments alleged by Plaintiff. Tr. 26, 28. The ALJ’s finding
12 is supported by substantial evidence and was a clear and convincing reason, in
13 conjunction with the other identified reasons, to discount Plaintiff’s symptom
14 complaints.

15 *4. Limited Mental Health Treatment*

16 The ALJ found that Plaintiff’s lack of treatment for her longstanding
17 depression further indicated that her mental impairment did not cause any
18 significant limitations in her functioning. Tr. 27. An unexplained, or inadequately
19 explained, failure to seek treatment or follow a prescribed course of treatment may
20 be considered when evaluating the claimant’s subjective symptoms. *Orn v. Astrue*,

1 495 F.3d 625, 638 (9th Cir. 2007). Evidence of a claimant's self-limitation and
2 lack of motivation to seek treatment are appropriate considerations in determining
3 the credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*,
4 240 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 Fed. App'x 45,
5 *2 (9th Cir. 2009) (unpublished opinion) (considering why plaintiff was not
6 seeking treatment). When there is no evidence suggesting that the failure to seek
7 or participate in treatment is attributable to a mental impairment rather than a
8 personal preference, it is reasonable for the ALJ to conclude that the level or
9 frequency of treatment is inconsistent with the alleged severity of complaints.
10 *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental
11 health treatment is partly due to a claimant's mental health condition, it may be
12 inappropriate to consider a claimant's lack of mental health treatment when
13 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100
14 F.3d 1462, 1465 (9th Cir. 1996).

15 The ALJ determined that Plaintiff's lack of treatment for depression
16 detracted from the reliability of her statements about her mental state. Tr. 27.
17 Plaintiff reported that she was unable to work in part due to depression and
18 anxiety. Tr. 239. However, the ALJ noted that Plaintiff had no documented
19 mental health care during the relevant period, despite a medical provider's
20 suggestion in August 2014 that she participate in counseling. Tr. 27 (citing Tr.

540-41). The ALJ noted that Plaintiff was treated with anti-depressants and had not required inpatient counseling or psychiatric hospitalizations during the relevant period of review. Tr. 27 (citing Tr. 541, 674). Further, the ALJ observed that Plaintiff frequently denied having depression, little interest or pleasure in doing things, or feelings of hopelessness. Tr. 27 (citing Tr. 679, 682, 685). There is no evidence to suggest that Plaintiff's failure to seek treatment is attributable to her mental impairment rather than a personal preference. The ALJ reasonably relied on this evidence in evaluating Plaintiff's symptom claims.

B. Lay Opinion Evidence

Plaintiff challenges the ALJ's rejection of the lay witness statements of her boyfriend, Troy Vella. ECF No. 14 at 14-16. An ALJ must consider the testimony of lay witnesses in determining whether a claimant is disabled. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). If the ALJ gives germane reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when rejecting similar testimony by a different witness. *Molina*, 674 F.3d at 1114; *see Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009) (holding that because the ALJ provided clear and convincing reasons for rejecting the claimant's own subjective complaints, and because the lay witness's testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for rejecting the lay witness's testimony). The ALJ may reject

1 lay opinion testimony that essentially reproduces the claimant's discredited
2 testimony. *See Valentine*, 574 F.3d at 694.

3 The ALJ considered a third-party function report dated August 30, 2015 from
4 Mr. Vella and assigned limited weight to his statements. Tr. 292-99. Mr. Vella
5 reported that Plaintiff was unable to sit or stand for long periods of time, and her
6 ability to walk was limited by her fatigue and "excruciating pain." *Compare* Tr.
7 292 with Tr. 280 (Plaintiff stated in her function report, also dated August 30,
8 2015, that she was unable to stand or sit "for more than a few minutes at a time").
9 Mr. Vella stated that Plaintiff had to lie down to relieve her symptoms. *Compare*
10 Tr. 292 with Tr. 280 (Plaintiff reported that she "ha[d] to be able to lay down at
11 any given moment"). He stated that Plaintiff struggled to get out of bed, required
12 help with showering, and "struggle[d] throughout the day to find a comfortable
13 position." *Compare* Tr. 293 with Tr. 281 (Plaintiff reported that she needed help
14 taking a shower and she "struggle[d] to find a comfy place to relax"). He noted
15 that Plaintiff was unable to lift, squat, bend, stand, walk, sit, or kneel due to
16 overwhelming back pain. *Compare* Tr. 297 with Tr. 285 (Plaintiff alleged she was
17 unable to lift, squat, bend, stand, reach, walk, sit, kneel, or climb stairs). Mr. Vella
18 also reported that Plaintiff "became anxious and depressed as a result of her
19 disability." *Compare* Tr. 297 with Tr. 286 (Plaintiff stated that she had anxiety).

1 The ALJ was required to give germane reasons to discredit this lay witness
2 opinion. *Nguyen*, 100 F.3d at 1467.

3 First, the ALJ gave limited weight to Mr. Vella's opinion because it was
4 based on casual observation rather than objective medical testing. Tr. 30.
5 Although "medical diagnoses are beyond the competence of lay witnesses and
6 therefore do not constitute competent evidence," lay testimony "as to a claimant's
7 symptoms or how an impairment affects ability to work *is* competent evidence."
8 *Nguyen*, 100 F.3d at 1467 (emphasis in original); *see also Dodrill v. Shalala*, 12
9 F.3d 915, 918-19 (9th Cir. 1993) ("[F]riends and family members in a position to
10 observe a claimant's symptoms and daily activities are competent to testify as to
11 her condition."). This was not a germane reason to discredit Mr. Vella's opinion.

12 Second, the ALJ gave limited weight to Mr. Vella's opinion because, as
13 Plaintiff's boyfriend and roommate, he was not a disinterested party in this case.
14 Tr. 30. "The fact that a lay witness is a family member cannot be a ground for
15 rejecting his or her testimony. To the contrary, testimony from lay witnesses who
16 see the claimant every day is of particular value." *Smolen v. Chater*, 80 F.3d 1273,
17 1289 (9th Cir. 1996) (internal citations omitted). Mr. Vella's relationship to
18 Plaintiff was not a germane reason to discredit his opinion.

19 Finally, the ALJ discounted Mr. Vella's opinion for the same reasons that he
20 discounted Plaintiff's symptom claims. Tr. 30 ("Ultimately, this opinion is not

1 persuasive for the same reasons that [Plaintiff's] own allegations are not fully
2 persuasive"). Where the ALJ gives clear and convincing reasons to reject a
3 claimant's testimony, and where a lay witness's testimony is similar to the
4 claimant's subjective complaints, the reasons given to reject the claimant's
5 testimony are also germane reasons to reject the lay witness testimony. *Valentine*,
6 574 F.3d at 694; *see also Molina*, 674 F.3d at 1114 ("[I]f the ALJ gives germane
7 reasons for rejecting testimony by one witness, the ALJ need only point to those
8 reasons when rejecting similar testimony by a different witness"). Thus, the ALJ's
9 well-supported reasons for rejecting Plaintiff's subjective symptom claims apply
10 equally to Mr. Vella's statements. This was a germane reason to discredit his
11 opinion. Although the ALJ erred by asserting improper reasons to reject Mr.
12 Vella's lay witness statements, these errors were harmless given the ALJ's reliance
13 on other germane reasons that were supported by substantial evidence. *See*
14 *Molina*, 674 F.3d at 1115 ("[S]everal of our cases have held that an ALJ's error
15 was harmless where the ALJ provided one or more invalid reasons for disbelieving
16 a claimant's testimony, but also provided valid reasons that were supported by the
17 record."); *see also Tommasetti*, 533 F.3d at 1038 (an error is harmless when "it is
18 clear from the record that the . . . error was inconsequential to the ultimate
19 nondisability determination").

1 **C. Step Five**

2 Plaintiff contends the ALJ erred at step five because the ALJ relied upon an
3 RFC and hypothetical that failed to include all of Plaintiff's limitations. ECF No.
4 14 at 16-17. However, the ALJ's RFC need only include those limitations found
5 credible and supported by substantial evidence. *Bayliss v. Barnhart*, 427 F.3d
6 1211, 1217 (9th Cir. 2005) ("The hypothetical that the ALJ posed to the VE
7 contained all of the limitations that the ALJ found credible and supported by
8 substantial evidence in the record."). The hypothetical that ultimately serves as the
9 basis for the ALJ's determination, i.e., the hypothetical that is predicated on the
10 ALJ's final RFC assessment, must account for all of the limitations and restrictions
11 of the particular claimant. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219,
12 1228 (9th Cir. 2009). "If an ALJ's hypothetical does not reflect all of the
13 claimant's limitations, then the expert's testimony has no evidentiary value to
14 support a finding that the claimant can perform jobs in the national economy." *Id.*
15 However, the ALJ "is free to accept or reject restrictions in a hypothetical question
16 that are not supported by substantial evidence." *Greger v. Barnhart*, 464 F.3d 968,
17 973 (9th Cir. 2006). A claimant fails to establish that a step five determination is
18 flawed by simply restating an argument that the ALJ improperly discounted certain
19
20

1 evidence, when the record demonstrates the evidence was properly rejected.

2 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175–76 (9th Cir. 2008).

3 Plaintiff asserts that the ALJ improperly rejected her symptom allegations,
4 and when the vocational expert was asked about some of these limitations, such as
5 a need to take breaks, she testified that Plaintiff would be unable to sustain
6 employment. ECF No. 14 at 17 (citing Tr. 60-61). Plaintiff’s argument is based
7 entirely on the assumption that the ALJ erred in discrediting her symptom
8 allegations. *See Stubbs-Danielson*, 539 F.3d at 1175 (challenge to ALJ’s step five
9 findings was unavailing where it “simply restates [claimant’s] argument that the
10 ALJ’s RFC finding did not account for all her limitations”). For reasons discussed
11 throughout this decision, the ALJ’s adverse findings in his consideration of
12 Plaintiff’s symptom allegations are legally sufficient and supported by substantial
13 evidence. Thus, the ALJ did not err in assessing the RFC, and he posed a
14 hypothetical to the vocational expert that incorporated all of the limitations in the
15 ALJ’s RFC determination, to which the expert responded that jobs within the
16 national economy existed that Plaintiff could perform. The ALJ properly relied
17 upon this testimony to support the step five determination. Therefore, the ALJ’s

1 step five determination that Plaintiff was not disabled within the meaning of the
2 Social Security Act was proper and supported by substantial evidence.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court concludes the
5 ALJ's decision is supported by substantial evidence and free of harmful legal error.

6 Accordingly, **IT IS HEREBY ORDERED:**

7
8 1. The District Court Executive is directed to substitute Andrew M. Saul as
9 the Defendant and update the docket sheet.

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

11 3. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
12 **GRANTED**.

13 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

14 The District Court Executive is directed to file this Order, provide copies to
15 counsel, and **CLOSE THE FILE**.

16 DATED October 18, 2019.

17 s/Mary K. Dimke
18 MARY K. DIMKE
19 UNITED STATES MAGISTRATE JUDGE
20